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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-6196

JAIME AVILES,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

JAIME AVILES,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Jaime Aviles respectfully moves this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on January 13, 1976.

Opinions Below

The Memorandum and Order of the United States District Court for the Southern District of New York is unreported and appears at Appendix A, *infra*. The Court of Appeals did not write an opinion. The order affirming the District Court appears at Appendix B, *infra*.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 13, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether, under Rule 11, Federal Rules of Criminal Procedure, a criminal defendant must be informed of the Special Parole Term imposed by 21 U.S.C. § 841 before a court may accept his plea of guilty?

2. Whether, under the due process clause of the Fifth Amendment, to the United States Constitution, a criminal defendant must be informed of the Special Parole Term imposed by 21 U.S.C. § 841 before a court may accept his plea of guilty?

Constitutional, Statutory, and Rules Provisions Involved

United States Constitution — Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code, Title 21

§ 841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a

prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

* * * * *

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Federal Rules of Criminal Procedure

Rule II. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. As amended Feb. 28, 1966, eff. July 1, 1966.

Statement of the Case

Petitioner Jaime Aviles pleaded guilty on February 15, 1973 in the United States District Court for the Southern District of New York to the charge of knowingly and willfuly distributing heroin, a schedule I narcotic, in violation of 21 U.S.C. § 841(a). On March 29, 1973 Aviles was sentenced to a term of twelve years imprisonment with an additional term of six years of special parole as required by 21 U.S.C. Sec. 841(b)(1)(A).

Aviles subsequently filed a Motiton to Vacate Sentence and Judgment pursuant to 28 U.S.C. § 2255 on the ground that the trial court failed to fully advise him of the consequences of his plea of guilty and that, as a result, his plea was not factually and intelligently made as required by Rule 11, Federal Rules of Criminal Procedure. In a Memorandum Opinion and Order [1] the District Court denied relief. Petitioner then filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

In an order rendered on January 13, 1976,[2] the Court of Appeals affirmed the Memorandum Opinion and Order of the District Court.

The petitioner had been arrested as an outgrowth of an investigation involving an undercover agent named Vazquez. As the result of Vazquez' work the petitioner, his brother, Antonio Aviles, and an Alfredo Medina were indicted for distributing heroin.

All three cases were assigned to District Judge Edmund Palmieri. Antonio Aviles was tried and acquitted by a jury. Alfredo Medina pleaded guilty and was sen-

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[1] See Appendix A, *infra*.
[2] See Appendix B, *infra*.

tenced as a multiple narcotic offender to a term of eight years. *Thereafter*, petitioner Aviles pleaded guilty before Judge Palmieri.

Petitioner, unlike Medina, was sentenced to twelve years imprisonment to be followed by six years of special parole.

In denying the petitioner's 28 U.S.C. Sec. 2255 application the District Court held that it was harmless error not to have advised the petitioner of the consequences of his guilty plea inasmuch as the combined total of the sentences did exceed the possible maximum term of imprisonment. The Court's below blind themselves to the petitioner's substantiated[3] argument that he had every expectation of receiving a sentence much less than imposed. Contrary to the Court's belief that he should be gratified by not receiving a sentence more severe than that imposed.[4]

Reasons for Granting the Writ

I. The Decision of the Court of Appeals conflicts with this Court's decision in *McCarthy* v. *United States* and the due process clause of the Fifth Amendment.

A. The acceptance of a guilty plea is clearly subject to constitutional protection. The rationale for applying constitutional restraints was first stated in *Kercheval* v. *United States*, 274 U.S. 220 (1927) when Mr. Justice Butler stated:

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[3] See Appendix C and D, *infra*. Minutes of pleading and sentencing in the District Court. Noteworthy, is counsel's statements at sentence demonstrating his expectation of a sentence at least equal to Medina's.

[4] See, Appendix E—Minutes of Appearance before District Judge Palmieri.

> A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and will full understanding of the consequences. *Id.* at 223.

The importance of the nature of a guilty plea was further explained in *McCarthy* v. *United States*, 394 U.S. 459 where Mr. Chief Justice Warren stated:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront accusers. *Id.* at 466.

Because the plea of guilty operates simultaneously as a waiver of constitutional rights and a conviction, the due process clause of the Fifth and Fourteenth Amendments requires that a plea of guilty only be accepted after a determination that it is free and voluntary. *Boykin* v. *Alabama*, 395 U.S. 238 (1968); *Brady* v. *United States*, 397 U.S. 742 (1970). A knowing and intelligent plea cannot be made if the defendant is not aware of the consequences of the plea. *Brady* v. *United States*, 397 U.S. at 748. Where the guilty plea is not knowing and intelligently made, the plea is in violation of due process and void. *McCarthy, supra.*

Before pleading guilty a defendant must be aware of the maximum sentence that he may receive in order to satisfy the requirements of due process. *See, e.g., Marvel* v. *United States*, 380 U.S. 262 (1965); *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948) (dictum). Aviles was

informed by the trial judge that he was subject to a maximum penalty of 25 years imprisonment for violation of 21 U.S.C. § 841(a). Actually, the term of imprisonment could be 30 years. No mention was made of the mandatory special parole term required by 21 U.S.C. § 841(b)(1)(A) which must be imposed for a *minimum* of six years on a second offender such as Aviles. Even more importantly, no mention was made of the effect of 21 U.S.C. § 841(c); under that subsection an individual who violates the special parole term may have his parole revoked and be imprisoned for the entire term of the special parole. No credit is given for the time spent on special parole. Combining these two subsections, a defendant's actual time in prison may be up to 30 years plus at least six years, but with no limit on this second factor. It is conceivable that an offender under § 841 could actually face life imprisonment if he were to violate an unlimited special parole term.

It is clear that Aviles was not only uninformed as to the existence of a special parole term, but that he did not actually know the maximum term to which he was subject under § 841. Failure to advise Aviles of his potential term of imprisonment was a violation of due process and rendered his guilty plea void.

The fact that the actual sentence imposed on Aviles, including the special parole term, was less than the maximum term of 25 years stated by the trial judge does not mean that Aviles was afforded due process. The critical issue is not what sentence was imposed but whether the defendant was aware of all of the consequences of his plea *at the time the plea was accepted.* A court may not infer, from the actual sentence imposed, what the unaware defendant would have done if he possessed full knowledge of the consequences of his plea at the time he made it. In *Boykin*, Mr. Justice Douglas stated:

> We cannot presume a waiver of these three important federal rights from a silent record.

> What is at stake for an accused facing death or imprisonment demands that utmost solicitude which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. 395 U.S. at 243-244.

The imposition of a lesser sentence cannot rectify a silent or erroneous record. A defendant who has entered a plea of guilty without full awareness of the consequences of that plea must be allowed to plead anew.

B. If the Court of Appeals' holding that a district court should inform a defendant of the special parole term is based on the belief that this information is required by Rule 11 then to hold that failure to so inform the defendant in the instant case was harmless error is inconsistent with *McCarthy*. *As stated previously, McCarthy stands for the proposition that failure to comply with Rule 11 is automatically prejudicial regardless of the harm which did or did not occur as a result of the violation. If the safeguards which McCarthy seeks to apply in order to assure the voluntariness of a defendant's guilty plea were to be applied only where lower courts believed the defendant was harmed, the whole rationale of McCarthy would be defeated.*

McCarthy was intended to prevent the type of inquiry beyond the record which occurred in the instant case. A court is not permitted to judge the voluntariness of a defendant's guilty plea in light of the sentence which he actually received:

> There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him.
>
> * * * * *

> Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. 394 U.S. at 470-72.

The court can only judge, by determining what is on the record, whether the lower court complied with the dictates of *McCarthy*. What actually happened to the defendant in terms of sentencing is irrelevant. See, *Wilbur Bell* v. *United States*, No. 75-5722, docketed in this Court on November 10, 1975.

In affirming the District Court's ruling in this case, the Court of Appeals' decision conflicts with *McCarthy* and the due process clause of the Fifth Amendment. It is important, both for petitioner Aviles and future interpretations of Rule 11, that the erroneous ruling below not be permitted to stand.

II. The decision below conflicts with the decisions of other courts of appeals as to whether failure to inform a criminal defendant of the special parole term required by certain subsections of 21 U.S.C. § 841 violates Rule 11, Federal Rules of Criminal Procedure.

A criminal defendant who pleads guilty to violating 21 U.S.C. § 841 faces the imposition of a mandatory special parole term of at least three years for a first offender and at least six years for a multiple offender. In its opinion the District Court held that it is not reversible

error for a court to accept a criminal defendant's guilty plea under 21 U.S.C. § 841 without informing the defendant of the mandatory special parole term provided for in that section. This conclusion, in order to be consistent with this Court's decision in *McCarthy* v. *United States*, *supra*, necessarily means that a special parole term is not a consequence under Rule 11, Fed. Rules of Crim. Proc. (as amended in 1966). In so holding, the District Court noted that its decision conflicted with the decisions in two other circuits: *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973) and *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974).

In *Richardson*, the appellant pleaded guilty in the trial court to distribution of heroin and other narcotics violations under 21 U.S.C. § 841(a)(1). Subsequently, he was sentenced to serve four concurrent ten year terms. Since it had apparently overlooked the mandatory imposition of a special parole term, the trial court later vacated the original sentence and resentenced Richardson to concurrent terms of ten years plus the minimum special parole term of three years as required by 21 U.S.C. § 841(b)(1)(A). 483 F.2d at 517.

On appeal, Richardson claimed that since he was unaware of the special parole term at the time he pleaded guilty, his plea was made without a full understanding of its consequences, in violation of Rule 11. In supporting this claim, the appellate court found the issue to be governed by case law holding that ineligibility for parole is a consequence of a guilty plea. Quoting from *Moody* v. *United States*, 469 F.2d 705 (8th Cir. 1972), the court stated:

> The rationale underlying the view of the majority of the circuits is that a defendant, unaware at the time of entering a plea of guilty that he will be ineligible for probation or parole, does not plead with understanding of the consequences of the plea,

> since the nature of parole is so well understood that its availability may be regarded as assumed by the average defendant. 383 F.2d at 518.

The court went on to state:

> This same rationale is equally applicable here, for a defendant does not plead with understanding of the consequences of his plea when he is unaware of the nature of the mandatory special parole term that must be imposed upon a guilty plea if a sentence of imprisonments results. 383 F.2d at 518-19.

The Court of Appeals for the Third Circuit in *Roberts* v. *United States*, *supra*, also found the special parole term to be a consequence of a guilty plea within the meaning of Rule 11. In *Roberts*, the defendant pleaded guilty to distribution of heroin, a schedule I narcotic, in violation of 21 U.S.C. § 841(a)(1). He was subsequently sentenced to a seven year prison term and, as required by 21 U.S.C. § 841(b)(1)(A), to the minimum three year special parole term, to take effect upon the completion of his regular sentence. *Roberts* v. *United States*, 491 F.2d at 1237. In finding the special parole term to be a consequence of a guilty plea, the court in *Roberts* utilized a different theory from that of the Eighth Circuit *Richardson*. Quoting from *Berry* v. *United States*, 412 F.2d 189 (3d Cir. 1969), the court stated that "the mandate of . . . [Rule] 11, before and after the 1966 amendment, is designed to insure that the pleader is made aware of the outer limits of punishment." *Id.* at 192.

Although no mention was made by the District Court in its opinion, there are decisions in other circuits which also conflict with the conclusion reached: The recent Sixth Circuit decision in *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975), is peculiarly applicable: In *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975) the lower court

accepted the defendant's guilty plea to 21 U.S.C. § 841 (a)(1) after the defendant indicated that he did not understand the special parole term. The Court of Appeals reversed, stating:

> Although the emphasis in the case law has been upon the requirement that the judge inform the defendant of the maximum possible period of incarceration, this circuit and other jurisdictions have indicated that a defendant must be aware of other direct consequences of his plea. . . . It is our determination that, in order to comply with Rule 11, the district judge must inform the defendant of the minimum sentence, either custodial or parole where there is a mandatory minimum, and of any special limitation of parole or probation. 510 F.2d at 166.

The Conclusion reached in this case is seemingly antithetical to the Court below's holding in *Michel* v. *United States*, 507 F.2d 461 (2d Cir. 1974):

> "We believe that the special parole here imposed is comparable [to ineligibility for parole] and that the defendant not only should be advised that it will be imposed but also should be asked by the Court if he understands that fact." 507 F.2d at 463.

In discussing the *Roberts* and *Richardson* opinions, the District Court below stated that while it agreed with the reasoning of those cases, it would not follow the per se rule set forth by them. The Second Circuit apparently reasoned that while a criminal defendant should be informed of the special parole term before his guilty plea is accepted, it is harmless error to fail to do so if the prison term plus the special parole term which he actually received do not exceed the maximum which he was told he could receive. Since *McCarthy* forbids a trial court

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from ruling that a violation of Rule 11 is harmless error, it must be assumed that the court below was concluding that there is no violation of Rule 11 when a defendant is not informed of the special parole term.[5]

In holding that failure to inform a defendant of the special parole term is not violative of Rule 11, the Fourth Circuit opinion conflicts with the conclusion of four other circuits. It is essential that this Court resolve the conflict between the circuits as to whether imposition of a special parole term is a consequence under Rule 11.

It should be noted that although the language of Rule 11 has changed as of August 1, 1975, it is doubtful that this change will resolve the conflict among the circuits respecting whether a defendant must be informed of the special parole term. Section (c)(1) of the amended Rule 11 effectively replaces the "consequences" provision of the previous rule. The new provision states in pertinent part:

> (c) ADVICE TO DEFENDANT — Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of and determine that he understands the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

Although the rule now speaks in terms of minimum and maximum penalties, the Courts of Appeals used that lan-

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[5] Petitioner assumes, for purposes of this argument, that the court below was following the reversible error rule of *McCarthy*. In section I, *supra*, petitioner contends that this assumption is not warranted and that the Second Circuit's holding cannot be squared with *McCarthy*.

guage under the old rule. In *Wolak* the court spoke of the special parole term as part of the minimum sentence of which a defendant had to be advised. In *Roberts* the court applied *Berry* to require that the defendant know of the special parole term as part of the outer limits of punishment. The Second Circuit was aware of both the *Wolak* and *Roberts* opinions when it made its decision, and still held that the special parole term was not a consequence within the meaning of Rule 11. There is nothing to suggest that any of the circuits will change their approach to the special parole term because of the change of language in the rule. Therefore, the existence of conflict among the circuits as to the requirements of Rule 11 is a compelling reason for this Court to grant a writ of certiorari despite the change in the Rule.

CONCLUSION

For the foregoing reasons a writ of certiorari should be issued to review the opinion and judgment of the court below.

Respectfully submitted,

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APPENDIX

APPENDIX A

Memorandum of Decision and Order

E.P. CR 36 OPIN 557

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JAIME AVILES,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

---

75 Civ. 3094

(72 Cr. 115)

E.L.P.

Filed—October 21, 1975

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Appendix A—Memorandum of Decision and Order

Jaime Aviles moves pursuant to 28 U.S.C. § 2255 to vacate a plea of guilty entered before this Court on February 15, 1973. The basis for his motion is that decisions of the Second Circuit handed down subsequent to his plea and retroactively applied, premit him to claim an infirmity in his plea due to the failure of the Court to advise him of special parole.

I.

The Factual Background

Aviles, a seller of heroin with previous federal and state convictions for violations of the narcotics laws, pleaded guilty on February 15, 1973, to a one count indictment charging him with the distribution and possession with intent to distribute a Schedule I narcotic drug in violation 21 U.S.C. § 841(a)(1). He was represented at all relevant steps in these proceedings, including this petition, by the same experienced counsel. He signed a formal waiver of constitutional rights and represented to the Court, through this form,[1] through his counsel, and independently, that he was aware of the possible penalty and had been fully advised on the subject by his attorney.[2]

---

[1] "My attorney has explained to me the nature of the charges against me, my constitutional rights, and the punishment that could be imposed by the court upon my plea of guilty."

* * * * *

"I, the attorney for the above-named defendant, have . . . explained to him . . . the punishment that could be imposed upon his guilty plea. . . ." Acknowledgment of Advice as to Constitutional Rights With Respect to Guilty Plea, attached hereto as Appendix A.

[2] "Mr. Rosenkranz: Your Honor, I have warned the defendant of his rights, and we both have acknowledged this advice of rights form. I have previously done so.

[Footnote continued on following page]

Immediately after the entry of this plea he pleaded guilty to an information charging him with a previous conviction for a narcotics offense under the federal narcotics laws and admitted to having been sentenced to a term of four years in prison by the United States District Court for the Eastern District of New York. The maximum sentence to which it was represented that he was exposed by his plea of guilty was 25 years in prison [3] and Aviles' counsel agreed that this was the case.[4]

"The Court: You have discussed that with him?

"Mr. Rosenkranz: Yes.

* * * * *

"The Court: *** Before entering this plea, did you discuss with your attorney all of the matters which are set forth on Court's Exhibit 1 for identification entitled "Acknowledgment of advice as to constitutional rights with respect to a guilty plea"?

"The Defendant: Yes, sir.

* * * * *

"The Court: And have you discussed with your lawyer, Mr. Rosenkranz, who is standing next to you, the possible penalty to which you are exposed by your plea of guilty in this case?

"The Defendant: Yes, sir."

[Transcript of Proceedings, United States of America v. Jaime Aviles, 72 Cr. 115, February 15, 1973, pp. 3-5.]

[3] This maximum was incorrectly stated. There was some confusion as to which section of the United States Code was applicable. The Assistant United States Attorney thought to have Aviles declared a "dangeous special drug offender" under 21 U.S.C. § 849, the maximum penalty for which is 25 years as he stated. 21 U.S.C. § 849(b). However, this is not the applicable section for two reasons. First, the detailed filing and hearing requirements were not complied with. 21 U.S.C. § 849(a) and (b). Second, § 849(c) gives priority to any other applicable section with a greater maximum. Since the Government filed a second offender information, the § 841(b)(1)(A) maximum (30 years in prison, 6 years minimum special parole) was the maximum sentence Aviles faced. However, Aviles has not raised this error in his petition and it is not here in issue.

[4] "Mr. Dougherty: Your Honor, I believe with the dangerous drug offender information the penalties are increased to a 25-year maximum. I believe that is section 849 of Title 26.

[Footnote continued on following page]

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Petitioner now urges that his sentence be vacated and that he be permitted to plead anew to the indictment on the ground that the Court failed to inform him that his plea would subject him to a term of special parole. A previous petition pursuant to 28 U.S.C. § 2255, based on wholly different grounds, was denied by this Court without a hearing on January 31, 1975 (Docket No. 74 Civ. 4905, see opinion of this Court dated January 31, 1975.)

The minutes of the plea proceedings here in issue disclose that the Court did not inform Aviles of the requirement of special parole prior to the acceptance of his plea. Although there was no requirement at that time that such information be directly imparted to him by the Court, the contention is made that the plea was invalid

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"The Court: Do you agree, Mr. Rosenkranz?

"Mr. Rosenkranz: Yes, sir.

"The Court: That he is exposed to a possible penalty of 25 years with the second offender information in the case?

"Mr. Rosenkranz: Yes, sir." [Transcript, p. 5]

* * * * *

"The Court: All of the questions that I asked you before would apply here as well. Have you pleaded guilty to this information after having discussed it to your satisfaction with Mr. Rosenkranz?

"The Defendant: Yes, sir.

"The Court: And you understand that by pleading guilty to this information you are exposed to a much more severe penalty.

"The Defendant: Yes, sir.

"The Court: Do you understand that?

"The Defendant: Yes, sir." [Transcript, p. 8]

It should be noted that Aviles entered two formal guilty pleas within minutes of each other, the first to the indictment and the second to a second narcotics offender information. His petition seeks relief only from the first of these. While this fact has no effect on the views expressed in this opinion, it bears mentioning because it puts the case in an unusual technical posture.

and should be set aside by virtue of the retroactive application of a subsequently adopted rule. There is no affidavit by Aviles alleging that he was not aware of mandatory special parole or that such awareness would have changed his plea. There is no affidavit by his attorney to the effect that he did not inform Aviles of special parole or that, to the best of his knowledge, Aviles was unaware of it. At a conference called by the Court, Aviles' attorney said that he informed Aviles only of the maximum prison sentence[3] and declined an opportunity to present evidence on these matters saying that an evidentiary hearing would serve no purpose since he based the petition solely on the minutes of the plea proceedings.

II.

The Recent Court of Appeals Decisions

In *Michel* v. *United States*, 507 F.2d 461 (2d Cir. 1974), the court stated that a defendant "not only should be advised that [special parole] will be imposed, but also should be asked by the court if he understands that fact." 507 F.2d at 463. In a later case, *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975), the court held that the rule announced in *Michel* should be applied retroactively. The court rejected the Government's contentions, stressed in its brief, that such an application of the *Michel* rule would bring about the disruption of a number of previous guilty pleas. In yet another case, *Brewington* v. *United States*, 515 F.2d 504 (2d Cir. 1975), the court

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[3] The attorney stated, in response to a question of the Court, that "[t]he only thing [Aviles] was concerned with . . . was the time he could face in prison and that's what I told him. . . . Maximum, 25 years. . . . That's what he believed he could get." Transcript of Conference of October 10, 1975, at 3.

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adhered without opinion to the *Michel-Ferguson* rule and held in effect that a defendant who had not been directly advised of the mandatory special parole was entitled to withdraw his plea.

III.

The Present Case Distinguished

What has been said would seem to impel the Court to permit the withdrawal of the plea in this case.

However, the Court is unable to take this step in view of important factual distinctions that can be drawn between the facts underlying the petition presently before the Court and the different factual situations confronted by the Second Circuit in reaching its decisions in the *Michel-Ferguson-Brewington* trilogy of cases. In *Michel* the denial of the petition was upheld on different grounds and the special parole rule was there announced as dictum. It was later adopted in the *Ferguson* decision. But the sentence imposed in the *Ferguson* case—the number of years in prison added to the number of years of special parole—exceeded the maximum sentence of which the defendant was advised.[6] In addition, Ferguson alleged that he was not aware of the special parole requirement and would not have pleaded guilty if he had been.[7] In

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[6] Ferguson was sentenced to five years in prison and five years of special parole on one count and, consecutively, to one year in prison and two years of special parole on another, for a total term of supervision of thirteen years. However, he was told that the maximum supervision he could receive was ten years—five years of imprisonment on each of two counts, to be served consecutively. Brief for Legal Aid Society as Amicus Curiae at 2, *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975).

[7] Brief for Legal Aid Society as Amicus Curiae at 3-4, *Ferguson, supra*, citing Ferguson's "traverse," document 3 of the record on appeal.

Brewington the Court of Appeals reversed on the authority of *Ferguson* without opinion. From the record it can be deduced that although a co-defendant was correctly informed of the possible sentence, Brewington was not directly advised of *any* statutory penalty at the same court hearing.[8]

In the case presently before the Court, Aviles was told, so far as the sentencing minutes indicate, that he could receive a maximum term of 25 years, while the sentence actually imposed was 12 years in prison and 6 years special parole. In short, the penalty imposed on Aviles, in contrast with the penalty imposed in the *Ferguson* case, was actually less than the maximum of which he was advised. In addition, Aviles has not alleged that he was unaware of special parole or that he would have pleaded differently if he had been informed of it.[9] There is,

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[8] The court first addressed Brewington's co-defendant, correctly stating the possible penalties including special parole. Transcript of Plea Proceedings before Judge Judd, June 25, 1973, at 1-12. Then the court addressed Brewington, apparently under the impression that he had heard all that had been said to his co-defendant. *Id.* at 14. The only mention of possible penalties to Brewington was the discussion of the Government's recommended six-year sentence. *Id.*, at 15, 17-18. The statutory penalties were not spelled out.

[9] The court in *Bye* v. *United States*, 435 F.2d 177 (2d Cir. 1970), which was relied upon heavily in arriving at the *Michel-Ferguson* automatic reversal rule, took pains to distinguish from its holding a case like the instant case in which the petitioner never alleged that he would not have pleaded guilty if the asserted error had not occurred. Regarding the failure to inform the petitioner that he would be ineligible for parole, the court noted:

> If he would have pleaded guilty even if he were informed that he was ineligible, it is hard to see how his alleged expectation of eligibility prejudiced his decision to plead guilty. 435 F.2d at 179, n. 5.

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therefore, no compelling precedent in the Second Circuit to indicate that the rule announced in *Michel* must apply retroactively notwithstanding the fact that the defendant recevied less than what he was led to believe he might receive as punishment. In first announcing the rule, by way of explication, the court said in *Michel* v. *United States, supra*:

> . . . Since special parole adds time to a regular sentence, it is within the *Bye* rationale. In *Bye* we said:
>
> "[T]he unavailability of parole directly affects the length of time an accused will have to serve in prison. . . . It would seem that such a major effect on the length of possible incarceration would have great importance to an accused in considering whether to plead guilty."
>
> 435 F.2d at 180. We believe that the special parole here imposed is comparable and that the defendant not only should be advised that it will be imposed, but also should be asked by the court if he understands that fact. 507 F.2d at 463. (Footnote omitted)

In Aviles' plea which is here the subject of controversy, there could have been no "major effect on the length of possible incarceration" since Aviles was told he could possibly receive a substantially longer sentence than the one imposed.

While no Second Circuit case has dealt with the particular factual pattern here involved, at least three [10]

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[10] The Third Circuit also may have faced the problem in *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974) but the facts are not clear from the opinion. *Roberts* establishes a rule similar

[Footnote continued on following page]

other circuits have decided cases squarely on point. The Seventh Circuit held in *Bachner* v. *United States*, 517 F.2d 589 (1975), that the petitioner should not be allowed to replead when his prison term plus special parole was less than the maximum imprisonment of which he was advised because, on these facts

> [f]ailure to advise a defendant of the mandatory parole term does not inherently result in a complete miscarriage of justice. 517 F.2d at 597.

The Fourth Circuit in *Bell* v. *United States*, —— F.2d —— (No. 74-2280, August 11, 1975) held that, while the court should determine that a narcotics defendant understands that his guilty plea subjects him to a special parole term, failure to do so

> is, however, harmless error when the sentence imposed on the defendant and the special parole term do not together exceed the maximum sentence specified at arraignment. Slip op. at 4.

This opinion carries the authority of an en banc decision because it was circulated to all members of the court and a majority concurred in it. Slip op. at 7 n. 3.

Bachner and *Bell* and their underlying theories are discussed below and found to be dispositive of the present

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to that in *Ferguson*. The Fifth Circuit, on different facts, recognized the basic distinction involved here in *Eakes* v. *United States*, 391 F.2d 287, 288 (1968):

> There is no merit to the contention of the appellant that the judgment should be vacated because the district court misled him as to the sentence which could be imposed, so that his plea of guilty was not made with full understanding of its consequences. Appellant received a lesser sentence than either that which the district court informed appellant it could impose or the maximum sentence provided by law.

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case. The one case to the contrary, *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973) is not followed here because its authority has been weakened by the subsequent Supreme Court decision, *Davis* v. *United States*, 417 U.S. 333 (1974), discussed below.

IV.

THE STANDARD FOR PLEA VACATUR UNDER FED. R. CRIM. P. 11

Rule 11 of the Federal Rules of Criminal Procedure, as it stood at the time the plea in question was taken, contained the following language:

> The court may refuse to accept the plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

The Supreme Court construed Rule 11 in *McCarthy* v. *United States*, 394 U.S. 459 (1969) in a manner it hoped would eliminate the need to resort to later fact-finding proceedings. The Court held

> that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. 394 U.S. at 463-64.

The Court further said that

> [t]here is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him. 394 U.S. at 470 (emphasis in original).

While this language is relatively clear, difficulty arises in handling matters that are not clearly within "the procedure provided for in Rule 11." [11] Several circuits have developed methods for handling such matters that avoid the automatic reversal rule of *McCarthy*.

In *United States* v. *Blair*, 470 F.2d 331 (5th Cir. 1972), the court avoided any hard and fast rule with respect to informing a defendant of the consequences of a guilty plea and drew a distinction between a total failure to inform and an error in informing. The court stated that where there is an error in informing the defendant of the consequences of a plea

> so long as the consequences which actually resulted from the plea were not more dire than the defendant had been led to believe they could be, the record allows an evaluation of whether or not the misinformation induced a plea which would not have been entered had the defendant known the actual maximum penalty. 470 F.2d 331, 340 n. 20.

The court there relied upon its own en banc decision in *United States* v. *Woodall*, 438 F.2d 1317, 1322 (5th Cir.), *cert. denied*, 403 U.S. 933 (1971), which established the rule of "case by case evaluation to determine whether the prospect of different punishment would have caused a change in the plea," and noted Judge Thornberry's explanation in a special concurrence in *Barton* v. *United States*, 458 F.2d 537, 543 (5th Cir. 1972), that the *Woodall* court avoided the automatic vacatur rule with a "weighing operation" whereby "[e]ach individual case must be determined on

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[11] As stated earlier, at the time the present plea was accepted there was no Second Circuit case requiring that the court directly notify the defendant of special parole.

its own facts, based on whether under all the circumstances the incorrect sentencing information had an effect *at the time of the plea* on the defendant's decision to plead guilty." 458 F.2d at 543 (emphasis in original). *See also, Johnson* v. *Wainwright*, 456 F.2d 1200 (5th Cir. 1972).

The Seventh Circuit relies on *Davis* v. *United States*, 417 U.S. 333 (1974), in finding that the automatic reversal rule of *McCarthy*, which was a direct appeal, is inapplicable to collateral attack petitions. The Supreme Court said in Davis:

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." 417 U.S. at 316.

The Seventh Circuit first announced this view in *Gates* v. *United States*, 515 F.2d 73 (1975) and elaborated on it in *Bachner*, *supra*. Bachner was told that he could receive as much as 15 years in prison and was not advised by the court of special parole. He received a ten year sentence, later corrected to seven years in prison and three years mandatory special parole. In finding that Bachner was not prejudiced, the court stated:

Bachner argues that under the statute he might have received either a sentence of fifteen years imprisonment plus a parole term, or a parole term far in excess of the mandatory of three years, with the result that the total of the term of his sentence and the term of his parole might have far exceeded the fifteen years he was advised was the maximum sentence he could receive. The remote and theoretical possibility that a complete miscarriage of justice might have occurred is not enough to satisfy the *Davis* test, when in fact no injustice has been done. 517 F.2d at 597.

V.

THE APPLICATION BY THE FOURTH CIRCUIT OF THE DOCTRINE OF HARMLESS ERROR TO THE FACTUAL PATTERN OF THIS CASE IS VALID AND PERSUASIVE.

The doctrine of harmless error was developed, largely by statute, to avoid automatic reversals for trial court errors revealed by hypercritical reading of transcripts.[12] The Supreme Court has recognized that harmless errors in the admission or exclusion of evidence should not result in the automatic reversal of trial results. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967), cited in *Rothschild* v. *New York*, —— F.2d —— (2d Cir., Sept. 25, 1975) and *United States ex rel. Hines* v. *LaVallee*, —— F.2d —— (2d Cir. Aug. 13, 1975).

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[12] *See Chapman* v. *California*, 386 U.S. 18, 22 (1967); R. Traynor, The Riddle of Harmless Error 1-14 (1970).

While *Harrington* and *Chapman* require that error be harmless beyond a reasonable doubt before it can be disregarded, they deal with federal constitutional error. Here we are dealing only with the requirements of technical procedural rules as construed by the Supreme Court "solely . . . pursuant to our supervisory power over the lower federal courts. . . ." *McCarthy* v. *United States*, 394 U.S. 459, 464 (1969). The standard for judging such error could hardly be as stringent as that for constitutional error. The Second Circuit has adopted a relaxed standard for denying a new trial due to the Government's nondisclosure of additional impeaching evidence. The court will order a new trial only where there is a "significant chance" that the added disclosure would have induced a reasonable doubt in the minds of the jurors.[13] *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975); *United States* v. *Bonano*, 430 F.2d 1060, 1063-64 (2d Cir.), *cert. denied*, 400 U.S. 964 (1970); *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir. 1969). Rule 52(a) of the Federal Rules of Criminal Procedure provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Judge Judd, writing for the Eastern District of New York, applied the harmless error doctrine to a case similar to that *sub judice* in a very able opinion in *Poerio* v. *United States*, — F. Supp. — (75-C-826, Sept. 16, 1975). Poerio stood before the bench during the pleading by his co-defendant, admitted hearing what was said to the co-

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[13] Chief Judge Traynor has suggested that convictions should not be reversed where there is a "high probability" that the error did not affect the result. R. Traynor, *supra* note 10, at 35-37, 44-51, 80-81 (1970).

defendant and was himself advised of all possible punishment except special parole. Judge Judd found it unnecessary to determine the precise standard for harmless error in a plea proceeding since he found that the plea had been voluntary and made with knowledge that a special parole term was mandatory. (Slip op. at 12).

Similar considerations led the Fourth Circuit to its result in *Bell* v. *United States*, *supra*. Bell was told that the maximum punishment he could receive was 15 years in prison. He was sentenced to six years in prison and three years special parole. While agreeing that invalidation of the plea is required when the sentence and the special parole term exceed the maximum sentence a petitioner was told he could receive, the court expressly found this to be harmless error (see pp. 7-8, *supra*) and added that

> when, as here, the combination is less than the maximum of which the prisoner had been advised, we perceive no warrant to conclude that he was misled. Slip op. at 6.

VI.

The Alleged Error, Far From Warranting An Invalidation of the Plea as a Substantial Miscarriage of Justice, Should Be Disregarded as Harmless Procedural Error.

Either of the above theories, whether that of the Fourth or that of the Seventh Circuit, is dispositive of the instant case. Under the Seventh Circuit's analysis, the nonconstitutional omission, though in retrospect an error, is not a fundamental defect and did not result in a complete miscarriage of justice. The harmless error approach of the Fourth Circuit is equally dispositive on

several grounds. First, Aviles alleges neither that he was misled to his prejudice nor that mention of special parole would have changed his plea. Second, as the Fourth Circuit concluded in *Bell*, since he received a shorter period of federal supervision than he was advised of, he can claim no harm.[14] There is simply no "significant

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[14] The Court is well aware that the Second Circuit has, in considering a different issue, rejected the claim that there is no harm if the punishment given is less severe than that advised of, *Bye* v. *United States*, 435 F.2d 177, 180 (2d Cir. 1970). But the reasoning there is inapposite to the present facts. In *Bye*, the defendant was not told that he would be ineligible for parole should he plead guilty. The court concluded:

> The government's argument that Bye was not prejudiced since his actual mandatory incarceration under his sentence falls within the perceived range of mandatory incarceration periods had parole been available, misconceives the nature of the danger of an accused pleading guilty while unaware of his ineligibility for parole. The danger is that the accused makes his decision to plead guilty underestimating by a factor of three the risk of prolonged mandatory incarceration. 435 F.2d at 180.

The special parole term entails no such automatic lengthening of the period of incarceration, and its effect on the defendant, if any, is dependent on his future behavior which is, at the time of the plea, at best speculative and subjective and as such cannot be given the significance of a lengthening of a mandatory period of incarceration. The Seventh Circuit, in *Bachner*, *supra*, explained it in this manner:

> Unlike ineligibility for parole, which "automatically trebles the *mandatory* period of incarceration which an accused would receive under normal circumstances," United States v. Smith, *supra*, 440 F.2d at 525 (emphasis in original), the mandatory parole term has no effect on that period of incarceration and does not ever become material unless the defendant violates the conditions of his parole. It would be as unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it would be

[Footnote continued on following page]

chance" that he was misled to his prejudice. He was well aware that as a second offender he was exposed to an extended prison term since the court stressed this to him before accepting his plea (see note 4 above), yet the total term of supervision to which he was sentenced was far shorter than that of which he was advised. Aviles' unsuccessful § 2255 petition on other grounds and the two years and three months between Aviles' sentencing and filing of this petition stand as some evidence of the fact that neither he nor his counsel was surprised by the imposition of a special parole term or initially thought of the absence of any special parole reference as a possible infirmity to his sentence. Finally, in the words of Fed. R. Crim. P. 52(a), while the imposition of a special parole term surely involves a defendant's substantial rights, a less-than-advised term does not adversely affect these rights.

The sterile attack mounted by Aviles deserves further comment. He has grounded this petition solely on the non-utterance of the words "special parole." Both he and his attorney have removed from this case any significance that might attach to their states of mind at the time of the plea. Neither he nor his experienced attorney, who represented him at his plea, at his sentencing, and on this petition, has claimed that they were misled or surprised to their prejudice. The attorney specifically declined an opportunity to present any such evidence. This petition was inspired solely by the language in *Michel* and *Ferguson*. What Aviles is saying, in effect, is that since the ritualistic utterance of the words "special parole" did

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to assume that he would be influenced by other contingencies he is not advised about [such as the intricate workings of "earned good time" and federal parole eligibility procedures]. 517 F.2d at 597.

not occur that he should stand free to deal with this old indictment as he pleases, and he claims that whether or not the mention of special parole would have changed his plea is totally irrelevant.

This poses squarely the issue of formalistic adherence to ritualistic words in plea procedures. It lends significant support to the application of the doctrine of harmless error to this case. And, very importantly, it adds a second major distinction between this case and the recent Second Circuit decisions since, in *Michel*, the petitioner affirmed that he did not understand the term special parole and his attorney affirmed that he did not discuss it with him, 507 F.2d at 463, 464, and, in *Ferguson*, the petitioner alleged that he was not aware of the mandatory special parole and would not have pleaded guilty if he had been (see note 7 above).

VII.

Conclusion

The petitioner pleaded guilty in the full knowledge that as a dangerous second offender he was exposed to a prison term of up to 25 years. In fact, he received the much less onerous sentence of 12 years imprisonment and 6 years special parole. Although petitioner was not directly advised of the statutory requirement for a term of special parole at the time of his plea, he did not suffer a "complete miscarriage of justice," because he received a sentence which, combining the terms of imprisonment and special parole, was 7 years less than the maximum prison term to which he knew he was exposed. Since petitioner in fact suffered no actual prejudice, the failure to inform him of special parole on the record was harmless error, and to vacate his guilty plea and sentence because of the

non-utterance of special parole would be to elevate form over substance.

It seems to this Court that the automatic invalidation of the plea in this case would set at liberty a serious violator of the narcotics laws who has had long experience with the criminal law,[15] and who now seeks to abort his prosecution by invoking the retroactive application of the rule in *Michel* to the facts of his case without a showing of prejudice. It is unlikely that this defendant can now be successfully prosecuted. The passage of time has eroded and scattered the evidence against him. His serious factual admissions at the time he pleaded guilty would no longer stand as admissions against interest. To permit him to plead "not guilty" would open the jail doors for him. Such a result would inflict a serious recidivist upon the law-abiding community.

Perhaps most importantly, the Second Circuit has nowhere held that, where the combined sentence of imprisonment and special parole is less than the maximum of which a defendant was warned, the plea and sentence must be set aside. Indeed the contrary was clearly implied in *Michel*, and was so held by the Fourth and Seventh Circuits. This Court holds that the *Michel-Ferguson-Brewington* triology does not compel a retroactive application of the *Michel-Ferguson* language to the factual situation here and refuses to extend that language to cover the present case.

Petition denied. It is so ordered.

Dated: New York, N. Y.
October 21, 1975

EDMUND L. PALMIERI
U.S.D.J.

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[15]See Appendix B attached.

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APPENDIX B

Order

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-2143

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of January one thousand nine hundred and seventy-six.

Present: HON. IRVING R. KAUFMAN
Chief Judge
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Chief Judges

JAIME AVILES,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By: VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX C

Hearing Dated February 15, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed—July 23, 1973

72 Cr. 115

New York, N. Y.

February 15, 1973

UNITED STATES OF AMERICA

—v.—

JAIMES AVILES,

Defendant.

Before:

HON. EDMUND L. PALMIERI,

District Judge.

Appearances:

WHITNEY NORTH SEYMOUR, JR., ESQ.
United States Attorney for the
Southern District of New York

By: JAMES W. DOUGHERTY, ESQ.
GERARD HINCKLEY, ESQ.
Assistant United States Attorneys

RICHARD ROSENKRANZ, ESQ.
Attorney for the Defendant

(Case called)

The Clerk: Is the defendant ready?
Mr. Rosenkranz: Defendant ready.

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The Clerk: Is the Government ready?

Mr. Dougherty: Ready.

Mr. Rosenkranz: Your Honor, at this time there is going to be a change of plea, there is going to be a disposition.

Mr. Dougherty: Your Honor, before the defendant tenders his plea I would like to call the Court's attention to an information which I have given the clerk, which alleges that the defendant is a dangerous second offender and asks that he be treated as such for the purpose of sentencing.

The Court: Yes. Mr. Rosenkranz, I believe you were made aware of the fact that the Government intended to file an information charging that this defendant had been previously convicted of a narcotics offense pursuant to Title 26, United States Code, section 4704(a), and Title 18, United States Code, section 2, in 1962, and that he was sentenced to a term of four years in prison by then Judge Dooling.

Mr. Rosenkranz: Yes, your Honor.

The Court: You are aware that that information will be filed.

Mr. Rosenkranz: Yes.

The Court: All right, take his plea.

Mr. Rosenkranz: Your Honor, I have warned the defendant of his rights, and we both have acknowledged this advice of rights form. I have previously done so.

The Court: You have discussed that with him?

Mr. Rosenkranz: Yes.

The Court: That has been signed by you and by him?

Mr. Rosenkranz: Yes, your Honor.

The Court: All right. I would appreciate having it so it can be marked a Court's exhibit in these proceedings. Mark it a Court's exhibit.

(Court's Exhibit 1 marked for identification.)

Mr. Rosenkranz: Your Honor, at this time the defendant Jaime Aviles offers to withdraw his plea of not guilty heretofore entered and offers to plead guilty to the one and only count of the indictment.

The Court: Very well. The clerk will take his plea.

The Clerk: Jaime Aviles, the grand jury charges that on or about the 28th day of October, 1971, in the Southern District of New York, you, the defendant, unlawfully, willfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 12.8 grams of heroin hydrochloride. Do you understand the charge in the indictment?

The Defendant: Yes.

The Clerk: How do you plead to the charge?

The Defendant: Guilty.

The Court: Jaime Aviles, I must ask you certain questions to make sure that your plea has been properly entered. Before entering this plea, did you discuss with your attorney all of the matters which are set forth on Court's Exhibit 1 for identification entitled "Acknowledgement of advice as to constitutional rights with respect to a guilty plea"?

The Defendant: Yes, sir.

The Court: Speak in a loud voice so that I can hear you distinctly. You understand that your plea of guilty

is an irrevocable step; that once you take this step you have no longer any right to call witnesses, to hear witnesses, to have a jury or a trial; and that the only function left to the Court is to impose whatever punishment may be proper under the law and the facts of the case?

The Defendant: Yes, sir.

The Court: Do you understand that?

The Defendant: Yes, sir.

The Court: And have you discussed with your lawyer, Mr. Rosenkranz, who is standing next to you, the possible penalty to which you are exposed by your plea of guilty in this case?

The Defendant: Yes, sir.

The Court: Will you state what that penalty is, please, Mr. Dougherty?

Mr. Dougherty: Your Honor, I believe with the dangerous drug offender information the penalties are increased to a 25-year maximum. I believe that is section 849 of Title 26.

The Court: Do you agree, Mr. Rosenkranz?

Mr. Rosenkranz: Yes, sir.

The Court: That he is exposed to a possible penalty of 25 years with the second offender information in the case?

Mr. Rosenkranz: Yes, sir.

The Court: Jaime Aviles, did you plead guilty after discussing the case to your satisfaction with Mr. Rosenkranz?

Mr. Rosenkranz: Yes, sir.

The Court: Has anybody made you any promises to induce you to plead guilty against your will?

The Defendant: No, sir.

The Court: Have you taken this step and entered your plea of guilty to this indictment of your own free will?

The Defendant: Yes, sir.

The Court: And after having discussed the case to your satisfaction with your attorney, Mr. Rosenkranz?

The Defendant: Yes, sir.

The Court: Now will you please tell me in your own words just what you did which led to this charge and to your plea of guilty thereto. This says that you did something on October 28, 1971. What did you do?

The Defendant: Well, I sold it to the man. I don't know his name.

Mr. Rosenkranz: He said, "I sold it to the man; I don't know his name."

The Court: What did you sell to the man? If you sold him an apple, that is not a crime. What did you sell to the man?

The Defendant: Heroin.

The Court: And you knew that it was wrong to sell heroin?

The Defendant: Yes.

The Court: And that this was a drug that you could not lawfully sell. Did you understand that at the time you sold it to him?

The Defendant: Yes.

The Court: And did you get any money for selling it to him?

The Defendant: Yes, sir.

The Court: What did you get?

The Defendant: Seven hundred dollar.

The Court: Are there any questions which counsel wish to suggest to the Court?

Mr. Dougherty: None, your Honor.

The Court: Then the plea is accepted. You can now arraign him on the information.

The Clerk: Mr. Aviles, the United States Attorney charges that you, having previously been convicted as herein below described, you, the defendant, on or about the 16th day of August, 1962, in the Eastern District of New York, entered a plea of guilty to the charge of unlawfully selling, dispensing and distributing a quantity of heroin in violation of Title 26, United States Code, Section 4704(a), and Title 18, United States Code, section 2. You, the defendant, were sentenced to a term of four years in prison by the Hon. John F. Dooling, Jr., United States District Judge, on August 16, 1962.

The Defendant: Yes.

The Clerk: Do you understand the charge in this information?

The Defendant: Yes.

The Clerk: How do you plead?

The Defendant: Guilty.

The Court: Have you discussed this information with your attorney before pleading guilty to it?

The Defendant: Yes.

The Court: All of the questions that I asked you before would apply here as well. Have you pleaded guilty to this information after having discussed it to your satisfaction with Mr. Rosenkranz?

The Defendant: Yes, sir.

The Court: And you understand that by pleading guilty to this information you are exposed to a much more severe penalty.

The Defendant: Yes, sir.

The Court: Do you understand that?

The Defendant: Yes, sir.

The Court: I will revoke bail and remand the defendant. I would direct that I get a presentence report.

Mr. Rosenkranz: Did your Honor say you will or you won't?

The Court: I will.

Mr. Rosenkranz: Would your Honor continue the bail?

The Court: No.

Mr. Rosenkranz: Judge, he is out on a good deal of bail.

The Court: No. He has no right to be out. This man is a drug trafficker, a second offender. He should be in jail. He should have been in jail a long time ago. You knew, this case has been prolonged and prolonged and prolonged. It is scandalous. This indictment has been pending for a year.

Mr. Rosenkranz: Judge, he has always appeared whenever he was asked to be.

Appendix C—Hearing Dated February 15, 1973

The Court: The point is, that we are not having social contacts with this man. The law-abiding community is entitled to be protected from him.

Mr. Rosenkranz: Judge, the defense in the case——

The Court: I am not interested in whether he always appears. I am not interested in seeing him. I am interested in acting here under my duty as a representative of the judicial branch of the government in order to function properly.

Mr. Rosenkranz: Would your Honor give him just a short time to straighten out his personal affairs?

The Court: No. He has sedulously cultivated every possible opportunity to delay the trial of this case. Everything. Everything possible that could possibly be done.

Mr. Rosenkranz: Judge, he didn't. It was counsel who did——

The Court: All right, counsel. But he has been riding on the coattails of your engagements with great success. This is the end, and he is going to jail where he belongs. He should have expected this. This man is streetwise and jailwise. He knows perfectly well that he wasn't going to get——

Mr. Rosenkranz: Frankly, he asked me my advise, and I advised him that bail would be continued.

The Court: Why did you advise him that?

Mr. Rosenkranz: Because it has been my experience that where defendant pleads guilty he is given certain——

The Court: He is? Well, it is not mine. I am sorry, Mr. Rosenkranz, that we haven't had the pleasure of working together before, because in every narcotic case that I have ever had, except one—and it was with the Government's request and consent and for special reasons

—I have always remanded people who plead guilty or are found guilty on narcotics offenses.

Mr. Rosenkranz: I can understand where he went on trial and denied his guilt. But here he has pleaded guilty. I would ask your Honor to continue it under these circumstances.

The Court: Do you think this man should be continued on bail, Mr. Dougherty?

Mr. Dougherty: Defense counsel approached me on that question, your Honor, and I had not up until the time I appeared here expected to do other than to go to trial, and never gave it serious consideration. But I join with your Honor in expressing concern that, given the extended sentence treatment that this defendant is exposed to, he is a jail risk.

Mr. Rosenkranz: Judge, this case goes back a year and a half. He has one prior conviction; the last conviction was ten years ago. This case arose when an agent was supposedly looking for the brother Alfredo, the one who is a Government agent—or who is now a Government informer or helping the Government. They were looking for Alfredo. This defendant was present at the social club where this took place. He knew where the brother kept the stuff and he made the transaction. I am not saying that he is not guilty. He is guilty and he pleaded guilty. But he has always appeared, and I would ask the Court's consideration.

The Court: No.

Mr. Rosenkranz: He is out on a $10,000 surety plus $15,000 personal recognizance put up by a storekeeper who guaranteed that he would make good the $15,000. It is a total of $25,000.

The Court: It would be contrary to my conscience and I can't do it.

Mr. Rosenkranz: Then would you give him until Monday?

The Court: I won't give him until tomorrow morning. He is going to go to jail right now. And it is not because I have any joy in being severe. I fell sorry for this man, because I will have to impose a very severe sentence upon him. But he has to go to jail. The community is entitled to be protected from people like this. This man has been in the narcotics trade for a long time. And the only way to put an end to it is to quarantine him, and the only quarantine is a jail. So he belongs in jail.

I revoke the bail. I am sorry I can't accommodate you, Mr. Rosenkranz, but I couldn't live with myself and I couldn't live with my conscience if I allowed this man any freedom. He must go to jail. He has pleaded guilty to a very serious offense, of which he is a second offender. But I might add that even if he were a first offender he would go to jail. I have done so consistently in practically every case I have ever tried or in every case I have received a bail.

Is there a marshal in the court?

The Clerk: He is on his way over, your Honor.

The Court: All right. Presentence report six weeks from now. Sentence will be on March 29, Thursday.

Mr. Rosenkranz: Judge, will that be at 2:15?

The Court: At 4:15.

Mr. Rosenkranz: 4:15?

The Court: 4:15.

Mr. Rosenkranz: That is even better. Thank you.

The Court: In whatever court I am in.

The Clerk: 4:15, your Honor?

The Court: 4:15, Thursday, March 29.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

WILLIAM COHEN,
Official Court Reporter
U.S. District Court

APPENDIX D

Hearing Dated March 29, 1973

4:25 p.m.

72 Cr. 115

UNITED STATES OF AMERICA

—v.—

JAIME AVILES,

Defendant.

Before:

HON. EDMUND L. PALMIERI, D. S.

For the Government:

WHITNEY NORTH SEYMOUR, JR.,

By: JAMES DOUGHERTY,
Assistant United States Attorney

For the Defendant:

RICHARD ROSENKRANZ, ESQ.

The Court: For sentence, United States of America vs. Jaime Aviles. Is the Government ready?

Mr. Dougherty: The Government is ready, your Honor.

Mr. Rosenkranz: The defendant is ready.

The Court: Does the Government wish to make any statement?

Mr. Dougherty: The Government has no comment, your Honor.

The Court: Mr. Rosenkranz, is there anything you wish to say?

Appendix D—Hearing Dated March 29, 1973

Mr. Rosenkranz: Yes, your Honor. I would ask, I did call your chambers earlier, your Honor. Does your Honor permit counsel to examine the probation report?

The Court: No. I never have and I believe these presentence reports should be treated as confidential information for the use of the judge and I must, therefore, respectfully decline your application to inspect the presentence report.

Mr. Rosenkranz: Your Honor, this defendant plead guilty to the charge. He has admitted his guilt in open court. The charge consists of the sale of narcotics. It is not a large sale. It consists of approximately $750 worth of narcotics. The defendant also does have a prior conviction which goes back some years. I believe his last conviction was in 1961 or '62.

If your Honor recalls the facts of the case, this defendant was in a social club and the agent came in looking for his brother, Alfredo Aviles. Alfredo Aviles is unquestionably involved in the narcotics business. Alfredo Aviles is involved in some very large cases. He is involved in a big case down in Florida and he is also involved in a large case in the Southern District and he was the person who the agent had come looking for, and when he was not available, this defendant was able to put his hands on the small amount of narcotics that is involved in this case.

Alfredo Aviles is at this time cooperating with the Government and there is no question about that. The Government has checked on that, the brother, Alfredo, was even brought up and he thought, and told me at one point when he was in custody, that his cooperation was supposed to cover this defendant, but the Government said that it did not and, of course, it has not. But

the point is that he was the person who was the target of the investigation and he was the person that the agent had come, the undercover agent had come looking for and now he is cooperating with the Government, and I think it would be an unfortunate coincidence if the person who was heavily involved in the business is later treated in a way much more leniently than the brother who is an unfortunate victim of circumstance, so to speak.

This defendant is not a large dealer. Another individual who was arrested as part of this same investigation, Juan Medina, he had dealt with the same undercover agent. He had been involved in two actual sales with that undercover agent at or about the same time that this had taken place. He also made attempts or also talked to the agent about a possible $60,000 transaction. And he was also a second narcotic offender and had pleaded guilty to two sales before your Honor, and I believe your Honor sentenced him to eight years.

The Court: What was the name of that defendant?

Mr. Rosenkranz: Medina.

The Court: When was that sentence imposed?

Mr. Rosenkranz: Within the last year.

The Court: You say he was convicted for the second time under the federal narcotics laws?

Mr. Rosenkranz: That is correct. Before your Honor. He plead guilty to two sales and there was a third transaction in which he had discussed with the agents a possible $60,000 transaction and he was a second federal narcotic offender and he received a sentence of eight years.

The Court: I am surprised. I must have had some special reasons for doing it. What was his first name?

Mr. Dougherty: I believe it was Alfred, your Honor.

The Court: Could you confirm that?

Mr. Dougherty: I was not involved in the case at that time.

Mr. Rosenkranz: Mr. Kenney of the United States Attorney's Office can confirm it. I discussed it with him. The defendant's name is Alfredo Medina. M-e-d-i-n-a.

Mr. Rosenkranz: There is no minimum sentence here.

The Court: I know, but even so it surprises me because unless I had some very special reasons for doing it, I would normally never impose a sentence of eight years on a person who is twice convicted under the federal narcotic laws. If there were a '60 offense in the way that would be different. In this man's case, for instance, in your client's case I see that they combined about four or five different narcotics arrests covering a period from '57, '58, '59 and '61. They made all one disposition of it, of one and a half to three years. Which amounts to giving him one sentence for five offenses under the state law. Which to me is shocking, but I could understand how they dispose of these cases in the State Court, and I will never begin to understand some of the many policies they follow, including the policy of deferred prosecution where a man can commit a crime and there isn't even a record of his arraignment. They don't even arraign him.

Mr. Rosenkranz: I don't know what the facts of those cases are.

The Court: Let's go on. We are concerned with this man's case. That is what I am concerned with and that is what I have studied. If you want his sentence to be completely compatible with every sentence that has been imposed by me and everybody else, I think you are wasting your time. You are talking about the brother who did

that, I don't see what relation it had. This man has to answer for his own violation of his law. His own violations of law are serious and he is a professional criminal who has had constant contacts with the criminal law, and he has had continuous association with this nefarious traffic.

Mr. Rosenkranz: Judge, his association is through his brother.

The Court: I do not care who it is through. He is an adult, society has seen fit to teach him a lesson and deal with him leniently. It has served no useful purpose.

Mr. Rosenkranz: Was I correct, your Honor, in what I stated.

The Court: I do not know yet. Mr. Kenney is on his way up and as soon as he comes I will tell you. I have no doubt you are making a bona fide representation of what I did. Do not feel that I am trying to correct your accuracy, but I am sure there must have been some reason for it because on the surface of it it surprises me, and I cannot believe that I sentenced a second federal violator to eight years unless there was some special reason. I will find those reasons out in a mimute if they exist and if they do not I will be the first to tell you that they do not.

Mr. Rosenkranz: Your Honor, again, this defendant was not the person who was being sought out——

The Court: What difference does it make? There are many cases in this court where federal agents are seeking out one culprit and they stumble on another. You say if this was for the first time they could not have caught him. Do you think that is a logical reason to condone this offense? I do not. I have a case next month against a lawyer defendant who was caught by accident in a crime they were not investigating.

Mr. Rosenkranz: I am not trying to condone it. What I am saying is that this is a man who lives on the fringe of an economic situation——

The Court: Yes, $700 is not on the fringe of any economic situation in my book. There are many people who do not earn that in a month and try to support themselves and family on it. You call him on the economic fringe? He makes one sale for $700, the Government has lost the money, which apparently it never recovered, and that is on the fringe? I do not know what fringes you are talking about. But from my understanding of what happens in this community, a $700 narcotic transaction is not a peripheral transaction. I would call a $5 transaction one, but a $700 one.

Mr. Rosenkranz: It is certainly not as large as ones we have seen in the Federal Court.

The Court: Everything is relative, Mr. Rosenkranz. I know you are doing the best you can for your client, but there is nothing that you say that bespeaks clemency except one thing, he pleaded guilty. That is the one fact that has to be considered in his favor. Everything else is against him. You can be seated if you have finished, because I am going to wait for Mr. Kenney to come here and I will talk to him and I will tell you what he told me, if I can tell you. Maybe there is some confidential reason, I do not know.

(Pause)

(Discussion off the record.)

The Court: Gentlemen, it is true that Medina was a second offender under the Federal Narcotics Laws, that he had been given a five-year sentence on his first conviction and I gave him eight years on his second conviction. But he had been addict for twenty years and his attorney

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made a very strong plea that he be treated as an addict under the law. The United States Attorney opposed that and I sided with the United States Attorney and did not have him treated as an addict, but I could not help keeping that in giving that some consideration. Another element which deserves mentioning is that Medina was working with one of the Aviles brothers and that he, jointly with one of the Aviles, sold a quantity of heroin to an undercover agent on one occasion, in addition to selling on his own on another occasion.

While it is true that he did discuss a very large transaction involving the possible expenditure of $30,000 for a kilo, the facts of the matter are that his supplier was Alfredo, alias Freddy Aviles. So he is part and parcel of this same group and a long-time addict. If I made a mistake I made a mistake. But it is a mistake of a possible two-year maximum. I do not think I would have given him more than ten years. I cannot remember now, it is so difficult to reconstruct the details of a sentence that is in your mind after you have read the presentence report and heard the arguments. But I cannot see any possible valid comparison between this man's position and the position of Medina. That man Jaime Aviles is no neophyte in this game and he is no addict. He has not the slightest element in his favor that speaks for leniency except the fact that he pleaded guilty. That is all I can say.

Mr. Rosenkranz: If I may just make one further point on the Medina matter. That man pleaded guilty to two sales plus he had the attempted transaction of a very large amount. This defendant, who is the brother of Alfredo Aviles, he knew where Alfredo kept his stuff, he knew what it was worth, but he had not been arrested for eleven years prior to this occasion. His last arrest was eleven years ago. He knew where his brother Alfredo

kept the stuff. That is who they were looking for. He certainly did not make $700 on this transaction. He may have made the sale for that amount but perhaps he made $100 or $150 on it. I am not saying that he should be complimented. He knows he has to go to jail.

The Court: The difference is, Medina was acting as a front man for Alfredo—

Mr. Rosenkranz: So was he.

The Court: And Medina's apartment was used for the purpose of steering people to Alfredo. This man is a brother of Alfred, he is much closer to Alfred than Medina was. Medina was a twenty-year addict. I do not see what you are driving at. If you think I am going to treat this man like I have treated Medina, you are mistaken.

Mr. Rosenkranz: But Medina had two sales, this man was one.

The Court: If I have to apologize for the inconsistency, I will do it another day. I do not see your pleading —here you have got a twenty-year addict who pleaded guilty, a twenty-year addict who was acting as a front man for this man's brother, and you say, ha, you gave him eight years, you put a barrier in front of yourself, you say it is eight years for everybody.

Mr. Rosenkranz: I am not saying that.

The Court: This man has been convicted many times for drug offenses. Once under the federal laws, many times under the state law.

Mr. Rosenkranz: But the last time was eleven years ago.

The Court: He also has a very unsavory and lengthy criminal record and he deserves no leniency whatever.

Mr. Rosenkranz: Judge, his last one was eleven years ago. It means that for eleven years he managed to stay out of trouble despite—

The Court: Despite the fact that he dealt in narcotics. A very highly commendable operation. His last arrest was eleven years ago. That might be due to a corrupt police or very clever activity on his part. You are not saying that he has led a law abiding life for eleven years, are you?

Mr. Rosenkranz: I don't know, Judge.

The Court: My report indicates that he has not.

Mr. Rosenkranz: I do know that they were looking for Alfredo and he knew where Alfredo kept the stuff and he made it available.

The Court: His last arrest for narcotics was '62 when he was given the mandatory five years. 1970 he has a New York arrest for possession, which was dismissed as is frequently the case. He has an assault conviction, possession and sale of heroin under the state laws. He was dealt with very leniently. Disorderly conduct, felonious assault with a knife, dealt with very leniently. You could almost say that this man has gotten away with murder. Is there anything else you want to say?

Mr. Rosenkranz: I have nothing to add, your Honor.

The Court: Jaime Aviles, is there anything you want to say before the sentence of this Court is imposed?

The Defendant: No, sir.

The Court: I sentence you to serve a term of twelve years imprisonment to be followed by six years of special parole as required by statute.

Mr. Rosenkranz: Would your Honor please make it ten years?

The Court: No. Is there only one count? Let me see the indictment.

(Pause)

The Court: Yes, it is one count.

The defendant has already previously admitted his prior conviction on a federal narcotic charge. That admission was made in open court in the presence of his attorney on April 15, 1973 and I therefore regard him as a second federal offender. There is only one count.

Mr. Rosenkranz: Your Honor, can he have a brief visit with his family which is here?

The Court: Ask the marshal. I have no control over that. That is a custodial problem.

(Time noted. 5:45 p.m.).

APPENDIX E

Hearing Dated October 10, 1975

3:30 p.m.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Cr. 115

UNITED STATES OF AMERICA

—v.—

JAIME AVILES,

Defendant.

Before:

HON. EDMUND L. PALMIERI,

District Judge.

Appearances:

PAUL J. CURRAN, ESQ.
United States Attorney

By: STEVEN FRANKEL, ESQ., of Counsel.

RICHARD ROSENKRANTZ, ESQ.
Attorney for Defendant

The Court: Gentlemen, I asked you to appear today because I wanted to clear the atmosphere a little bit.

I realize that you made the motion late in August and that the family of this man is importuning you for a quick decision and so forth, and I want to assure you that the matter has not escaped my attention at all. I was away on vacation until the 8th of September and this matter has been very much on my mind ever since.

The law is not entirely clear. There appears to be a conflict among the Circuits on this point, and I am in the process of laboring with an opinion. I am very close to a decision. I hope that before ten days are out, I will file my opinion.

Now, that being said, I was also concerned about another aspect of the matter and that has to do with whether or not I should conduct an evidentiary hearing.

In effect, you say, "Judge, you took his plea and you did not say special parole. Therefore, the plea is invalid. Therefore, he has to re-plea."

That is substantially what your position is, isn't it?

Mr. Rosenkrantz: Yes.

The Court: You remember the colloquy we had at the bench as to whether you agreed that was the maximum punishment. You said you did. The U.S. Attorney said 25 years, you said 25 years, and I accepted it. I did not think you two distinguished men could be wrong, but, apparently, anybody could be wrong.

You also said that you advised this man of the maximum punishment.

What did you advise him?

Mr. Rosenkrantz: The only thing he was concerned with and the only thing I thought he was concerned with was the time he could face in prison and that's what I told him.

The Court: What did you tell him?

Mr. Rosenkrantz: Maximum, 25 years.

The Court: That's what he believed he was going to get?

Mr. Rosenkrantz: That's what he believed he could get.

The Court: That is the maximum he thought he could get. So he ends up by getting twelve plus six, which we know is a lot less than twenty-five.

So, really, the essence of your complaint is that twelve plus six, even though it is less than twenty-five, does not conform with the statute because the statute requires me to utter those words. I did not utter them; therefore, the plea is invalid.

Isn't that the essence and guts of your motion?

Mr. Rosenkrantz: Based on the Ferguson decision, which is a similar decision.

The Court: Then there is no point in my having an evidentiary hearing.

Do you agree with that?

Mr. Rosenkrantz: Yes.

The Court: There would be no purpose in my having it. I think it is a narrow and clear-cut question of the law.

Mr. Rosenkrantz: The motion was made in June and returned on the 1st day of July.

The Court: Here is a reply affidavit filed by you on August 22, 1975.

Mr. Rosenkrantz: That's a reply to the Government's answer.

The Court: This motion was not fully submitted before me until the latter part of August.

Do you agree to that?

Mr. Rosenkrantz: Yes, your Honor.

The Court: All right, that clears it. As long as I can feel that I did the best I could, I did not want to give you the impression or even the unfortunate family of this defendant the impression that I was just sitting on these papers.

I have been put through an obstacle course, so to speak. The motion has forced me to do a lot of work. I am not complaining. It is a thorny question. I am going to do the best I can and then the powers that control my decision will have to decide what I have to do.

Mr. Rosenkrantz: With all due deference, your Honor states there is a conflict in the—

The Court: I prefer to have you anticipate my "learned" opinion.

Mr. Rosenkrantz: I don't think there is any conflict in this Circuit.

The Court: This Circuit stands clear and loud, but, in my opinion, alone. It is a clear conflict, and I will elucidate that statement very shortly. I am delighted you are interested and curious.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6196

JAIME AVILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction must be vacated because the district court failed to advise him of the mandatory special parole term provisions prior to accepting his plea of guilty.

On February 15, 1973, petitioner pleaded guilty in the United States District Court for the Southern District of New York to an indictment charging petitioner and a co-defendant with distribution of heroin, in violation of 21 U.S.C. 841(a)(1), and to an information charging petitioner as a second offender, pursuant to 21 U.S.C. 841(b)(1)(A) (Pet. App. C, pp. 23a, 26a). Before accepting the plea, the district court conducted an inquiry into its voluntariness, as required by Rule 11, Fed. R. Crim. P. Petitioner submitted a written waiver of constitutional rights, in which both he and his attorney represented that petitioner had been advised of the punishment that could be

imposed (Pet. App. A, pp. 2a-3a, nn. 1 and 2). At the proceeding, the prosecutor stated, and petitioner's counsel agreed, that the maximum sentence could be twenty-five years' imprisonment (Pet. App. C, p. 24a).[1]

The district judge accepted the guilty plea after satisfying himself that petitioner was entering it voluntarily and intelligently (Pet. App. A, pp. 24a-27a). Petitioner was subsequently sentenced to twelve years' imprisonment, to be followed by a six-year special parole term (Pet. App. D, p. 40a).

Over two years later, in June 1975, petitioner moved to vacate his conviction pursuant to 28 U.S.C. 2255 on the ground that he was not advised of the mandatory special parole term by the court at the time of his plea, in violation of Rule 11, Fed. R. Crim. P.[2] Petitioner did not claim that he was actually unaware of the mandatory special parole term at the time he pleaded, nor did he allege that the court's failure itself to advise him of that consequence of his plea had any bearing whatsoever upon his decision to plead guilty (that it did not is amply confirmed by the fact that petitioner made no effort to withdraw his plea for more than two years after the sentence including special parole was imposed). Instead, he simply claimed that two decisions of the court of appeals (*Michel* v. *United States*, 507 F.2d 461 (C.A. 2), and *Ferguson* v. *United States*, 513 F.2d 1011 (C.A. 2)) gave him the absolute right to have his conviction set aside even though the Rule 11 "defect" was wholly immaterial to either the knowing or the voluntary character of his plea (see Pet. App. A. p. 5a).

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[1]As the district court noted (Pet. App. A, p. 3a, n. 3), the correct maximum penalty is thirty years' imprisonment to be followed by a minimum term of six years' special parole.

[2]This is petitioner's second Section 2255 motion. In November 1974, petitioner moved to vacate on the grounds that the sentence violated a pre-pleading agreement with a government informant and that it was based in part on an inaccurate presentence report. The motion was denied, and petitioner did not appeal.

The district court denied relief (Pet. App. A), holding that collateral relief is not available to correct an error of the kind alleged by petitioner (Pet. App. A, pp. 12a-13a, 15a). The court also found the error to be harmless, because petitioner did not allege that he had been prejudiced and because the period of federal supervision under the sentence given was shorter than the possible sentence of which he was advised (Pet. App. A, p. 16a). The court of appeals affirmed summarily (Pet. App. B).

Petitioner's contention that his sentence must be vacated under the circumstances of this case is precisely the same claim as was advanced by the petitioner in *Bell* v. *United States,* No. 75-5722, certiorari denied, February 23, 1976. We rely here upon the arguments presented in our memorandum in opposition to certiorari in *Bell.*[3] As we there argued, and as the district court held in this case, the defect alleged by petitioner may not be raised in a Section 2255 proceeding, since petitioner has not claimed that his plea was entered involuntarily, that he would have refused to plead guilty had he been informed of the mandatory special parole term by the district court, or that holding him to his plea would be a miscarriage of justice. Indeed, on the facts of this case, any such claims would be highly suspect in light of the observations of the district court, which found (Pet. App. A, p. 17a):

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[3]We are furnishing counsel for petitioner with a copy of our memorandum in *Bell.* While the decision here, like that in *Bell,* appears inconsistent with results reached in other circuits (see *United States* v. *Yazbeck,* 524 F.2d 641 (C.A. 1); *Ferguson* v. *United States,* 513 F.2d 1011 (C.A. 2); *United States* v. *Wolak,* 510 F.2d 164 (C.A. 6); *Roberts* v. *United States,* 491 F.2d 1236 (C.A. 3); *United States* v. *Richardson,* 483 F.2d 516 (C.A. 8)), those conflicting results reflect no consideration of the limitations that exist upon the availability of collateral relief, and we continue to believe that any conflict will dissipate when the courts give attention to that factor.

> [Petitioner] was well aware that as a second offender he was exposed to an extended prison term since the court stressed this to him before accepting his plea * * *, yet the total term of supervision to which he was sentenced was far shorter than that of which he was advised. Aviles' unsuccessful §2255 petition on other grounds and the two years and three months between Aviles' sentencing and filing of this petition stand as some evidence of the fact that neither he nor his counsel was surprised by the imposition of a special parole term or initially thought of the absence of any special parole reference as a possible infirmity to his sentence.

Additionally, petitioner's counsel noted at a conference on the present motion that prior to pleading, petitioner was concerned only with the possible term of imprisonment (Pet. App. E, p. 43a).

In this light, petitioner's claim of technical noncompliance with Rule 11, Fed. R. Crim. P., does not raise " 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *." *Davis* v. *United States,* 417 U.S. 333, 346, quoting *Hill* v. *United States,* 368 U.S. 424, 428. Accordingly, petitioner's contention is not cognizable as a ground for collateral relief. See *Bachner* v. *United States,* 517 F.2d 589 (C.A. 7).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[4]For the first time, petitioner here claims that the Rule 11 defect constitutes a violation of due process (Pet. 8). Absent a claim that his plea was involuntary or that the procedures here were fundamentally unfair, petitioner's broad constitutional claim is groundless. See *Bachner* v. *United States, supra,* 517 F.2d at 598-599 (Stevens, J., concurring).